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In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC.,
a California non-profit corporation
and membership organization, *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY,
a separate legal entity created pursuant
to Bi-State Compact, *et al.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF

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INTRODUCTION

1. Twelve lawyers from six different law offices submitted the Tahoe Regional Planning Agency's (TRPA) brief, but they all missed the point of the Petitioners' (landowners) opening brief. They assert that "Petitioners *never explain* the legal underpinnings of their theory." (TRPA 15; emphasis added.) And, remaining true to that blindness, they never deal with the argument at pp. 32-49 of the opening brief – where those underpinnings are analyzed at length. In a nutshell, the landowners' legal theory is, as the headline on page 32 expressed it:

> **"FROM A LANDOWNER'S POINT OF VIEW, GOVERNMENT IMPOSITION OF A FREEZE ON ALL ECONOMICALLY PRODUCTIVE USES, ALBEIT TEMPORARILY, IS THE EQUIVALENT OF A TEMPORARY CONDEMNATION OF SUCH LAND. IN EITHER EVENT, THE RIGHTFUL OWNER'S *USE* OF THE LAND HAS BEEN TAKEN, AND JUST COMPENSATION IS DUE."**

Not one of TRPA's half dozen amici takes issue with this underlying thesis either. In fact, only one of them even mentions it, and its analysis supports the landowners, not TRPA. The brief filed by the National Audubon Society and three other environmental organizations put it this way:

> "As the Court made crystal clear in *First English*, regulatory takings doctrine flows from and is governed by the same basic principles which govern exercises of the power of eminent domain generally. *See* 482 U.S. at 314. When the government seizes property by eminent domain, say for a road, it cannot be argued that the government has no obligation to pay compensation because the road addresses a 'serious' or 'important' public transportation problem. Similarly, in the regulatory takings context, it would make no sense to conclude that the importance of the police power objective being pursued should weigh against a finding of a compensable taking." (Audubon 21-22.)

The Audubon Society's brief not only bolsters the landowners' legal theory, it lays to rest the arguments made by TRPA and the rest of its amici that moratoria in general, and this series of moratoria in particular, should not require compensation because they are imposed to achieve praiseworthy goals.

2. One other matter bears early mention. TRPA and its amici take the landowners to task for having the effrontery to note that the 1984 and 1987 TRPA Plans also precluded all use of these lots. But that's the fact. The trial judge found that, once the "temporary" moratoria were replaced by the 1984 Plan, "nothing much changed" for these landowners. (Pet. App., pp. 75-76.)

This Court does not sit to decide hypothetical questions. Thus, although it framed the question now being briefed as whether the Ninth Circuit erred in its conclusions about temporary takings, that question must be addressed on this record, not in a vacuum. (See *United States v. Dickinson*, 331 U.S. 745, 748 [1947] ["Constitution is intended to preserve practical and substantial rights, not to maintain theories. . . . "].)[1] Reality is this: these landowners waited during the entirety of the "temporary" moratorium period before filing suit. They did not immediately rush to court, but did so only after the "temporary" moratoria were replaced with a permanent plan in which "nothing much changed" for them, and the use of their land remained frozen.

Thus, TRPA's and its friends' generalizations about how temporary moratoria end, and how thereupon there is use at the end of the tunnel, do not deal with this case. The end of *these* moratoria made the land's disutility as permanent as the regulation in *Lucas v. South Carolina*

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[1] TRPA and its amici demand that this Court ignore the *fact* that the end of the moratoria brought only continued non-use, so they can defend the hypothetical *theory* that all moratoria eventually end and provide viable use (TRPA, pp. 26, 34-35; Audubon, pp. 1, 6, 18-19; APA, p. 28; SG, pp. 18-19) – even though this one did neither.

Coastal Council, 505 U.S. 1003 (1992). In short, Lake Tahoe is being protected on the backs of Petitioners, contrary to *Armstrong v. United States*, 364 U.S. 40, 49 (1960), which held that the cost of public benefits must be apportioned among those who benefit from them, and not simply dumped onto those few citizens who fortuitously find themselves in the path of grandiose government plans intended to benefit society at large.

I A MORATORIUM – AS EXEMPLIFIED HERE – IS A REGULATION THAT TOTALLY FREEZES THE ABILITY OF A LANDOWNER TO MAKE ANY ECONOMICALLY PRODUCTIVE USE OF LAND. THAT KIND OF REGULATION IS A *PER SE* TAKING THAT REQUIRES COMPENSATION.

Neither TRPA nor its amici want to defend the total freeze on property use effected by TRPA's moratoria.[2] Small wonder. Whenever commentators or lower courts have defended regulations that call themselves "moratoria," they focus on the uses remaining to the owners during the moratorium or the uses available thereafter.[3] They do so because even pro-government advocates know the importance – if moratoria are to be defensible – of *not* prohibiting *all* use, thereby leaving landowners something to do other than mark off days on a calendar. (E.g., Robert Meltz, Dwight H. Merriam & Richard M.

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[2] The amicus brief filed by 22 States, for example, demands that "[t]he issue cannot be limited to the context of the Tahoe Basin and the restrictions placed on petitioners' property" (States, p. 2), and then presents generalized arguments unrelated to this case. The American Planning Association takes a different tack, insisting that there *were* uses permitted. (APA, p. 28 ["there were a range of uses available."] None are mentioned, and no record is either cited or available to support that assertion.)

[3] See, e.g., *Sederquist v. City of Tiburon*, 765 F.2d 756, 758 (9th Cir. 1984), noting the moratorium in issue there provided for "use permits."

Frank, The Takings Issue 278 [1999] [ironically, one of the book's authors represents Respondent State of California herein].)

Here, however, *the facts preclude those arguments because there is no permitted use*. Nonetheless, TRPA and its amici base their position on the unmitigated fiction that the moratoria left Petitioners with some use of their land either during (APA, pp. 5, 28; Govt. Associations, pp. 17, 19) or after (TRPA, p. 26; Audubon, pp. 1, 6, 18-19, 27; APA, p. 28; SG, pp. 18-19; Govt. Associations, p. 17) the moratoria, or – incredibly – that these landowners actually *benefited* from the moratoria (TRPA, p. 26; SG, p. 29; States, p. 21).[4]

Thus, it seems necessary to examine the "moratorium" that is before this Court. This moratorium was a total freeze on the ability of the owners of the affected land to develop their land in any way. Moreover, when the moratorium supposedly ended, the affected owners were *still* forbidden to use their land. (Pet. App., pp. 75-76 [per trial judge: "nothing much changed"].) That is *not* the mere "adjust[ment of] the benefits and burdens of economic life" this Court talked about in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). That kind of moratorium has been recognized as being a *Lucas* taking requiring compensation:

> "A moratorium should be considered a categorical taking under *Lucas* when it prohibits all development or the submission of development applications on a given parcel of property that currently has available no economically beneficial or productive uses." (Wendy U. Larsen & Marcella Larsen, *Moratoria as Takings Under*

[4] By contrast, Judge Kozinski's dissent from the *en banc* vote below (for himself and four others) recognizes the reality of the two decade freeze. (Pet. App., pp. 158, 159, 163.) See also Steven J. Eagle, *Development Moratoria*, First English *Principles, and Regulatory Takings*, 31 Env. L. Rptr. 11232, 11237, 11238 (2001).

> Lucas, 46 Land Use Law & Zoning Dig., no. 6, p. 3 at 6 [1994].)
>
> "[I]n the residential context, a moratorium should be considered a categorical taking where property zoned residential has no existing habitable/saleable structures and is vacant." (Michael A. Zizka, et al., State & Local Government Land Use Liability § 4:4, p. 4-11 [rev. 2000].)
>
> "The Supreme Court's *Lucas* decision requires a holding that a per se taking has occurred when a moratorium denies a landowner all reasonable use of his land. . . . " (Daniel R. Mandelker, Jules B. Gerard & E. Thomas Sullivan, Federal Land Use Law § 2A.05[2][c], p. 2A-65 [rev. 2001].)

What is before this Court is a categorical moratorium that permits *no* productive private use during its entire existence. *That* is the factual predicate of this case. And *that* is the context in which the law needs to be analyzed. (See *Cohens v. Virginia*, 6 Wheat. [17 U.S.] 264, 399-400 [1821].)

Thus, the class of cases covered by the *per se* rule proposed by the landowners includes – like *Lucas* – those categorical moratoria that wholly preclude private economically productive use of privately owned land. If the Court were also to conclude that *other* kinds of moratoria (e.g., the kind that TRPA and its amici have chosen to defend, i.e., those that do *not* wholly preclude productive use) are subject to an *ad hoc* analysis under *Penn Central*,[5] that would not hinder reversal of the Ninth Circuit *on these facts*, nor preclude application of a *per se* rule when they recur.

[5] Intriguingly, TRPA's environmental amici seem to believe the *Penn Central* rule is not worth the paper it's written on. (Audubon, pp. 19-20, 23.)

II THE GOVERNMENT CANNOT TAKE THE RIGHT TO USE LAND – NEITHER THE EQUIVALENT OF A FEE INTEREST NOR A LEASEHOLD – WITHOUT COMPENSATION.

The salient feature of the common law is its ability to grow and adapt. Regulatory takings law is a particularly noteworthy illustration, because its modern history dates back only about two decades. When this Court re-entered the field after the nearly half-century pause that followed *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was properly cautious. But that does not mean that the first cases that came along locked the law in some rigid straightjacket. In its first effort, *Penn Central*, the Court was content to say that it had no hard and fast rules, and it would examine each takings case on its own facts. (438 U.S. at 124.)

The law continued to develop.[6] A few years later, the Court decided *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). By that time, the Court was ready to articulate the holding that a permanent physical invasion does not require *ad hoc* examination, and is a *per se* taking.[7] And then came *Lucas*, where the Court announced another *per se* taking event: a regulation that denied landowners the economically productive or beneficial use of their land. That didn't require *ad hoc* examination either.

TRPA believes the law then stopped developing; that when this Court said that those two types of government

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[6] From 1980 through 1987, for example, th Court devoted substantial resources to the question of whether the remedy for a regulatory taking was compensation or invalidation. (See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 305, 311 [1987].)

[7] While *Loretto* distinguished between physical and regulatory impacts on property, *First English* concluded (after the Court had five more years' experience with regulatory takings) that the two were legally the same. (482 U.S. at 318.)

action represented *per se*, or categorical, takings, that completed the list and closed the file. (See TRPA, pp. 15, 20.) TRPA is wrong.[8]

With respect, those who would make such arguments are what California's late Chief Justice Roger Traynor called "bogus defenders of stare decisis," bent on hiding behind their view of where the law stopped in order to prevent their opponents from obtaining justice. (Roger J. Traynor, *No Magic Words Could Do It Justice*, 49 Cal. L. Rev. 615, 621 [1961].)

A The Fundamental Rules of Regulatory Takings – the Same as Those in Direct Condemnations – Stem From the Fifth Amendment's Just Compensation Clause.

The rule the landowners seek here is only a modest application of concepts already announced, i.e., that a regulation totally forbidding all use of property for any period of time is another kind of *per se* taking. As discussed in the landowners' opening brief (and never disputed by TRPA), there is no legal, conceptual, or jurisprudential difference between a government agency's deliberate decision to freeze the use of land for a period of years and that same agency's formal condemnation of the right of user for the same time period. In the latter situation, no one would doubt the owner's right to compensation. The same should hold true here. This Court concluded plainly in *Lucas* that restraints imposed

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[8] In *Babbitt v. Youpee*, 519 U.S. 234 (1997), this Court considered adding another *per se* taking to the list: abrogation of the right to devise property. That proved unnecessary, however, because Congress clearly had failed to resolve the problems noted in *Hodel v. Irving*, 481 U.S. 704 (1987), in which the Court had struck down an earlier statute on the same subject. (519 U.S. at 243, fn. 3.) If this Court agreed with TRPA that the list of *per se* takings was closed, it could have said simply that there cannot be any additional *per se* takings. But it did not.

by regulation are constitutionally the same as those imposed through condemnation:

> "The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest *the practical equivalence* in this setting *of negative regulation and appropriation*. [Citing numerous statutes.]" (505 U.S. at 1018-1019; emphasis added.)

When regulations have the same effect as physical occupation (i.e., assuming control and precluding the landowners from using their own land),[9] there is no functional difference between the two modes of government action. (*First English*, 482 U.S. at 318-319; *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652 [1981] [Brennan, J., dissenting].) Either way, the owners are deprived of the use and enjoyment of their land, and it is that deprivation, not the formal acquisition of title by the government, that accomplishes the taking. (*U.S. v. General Motors*, 323 U.S. 373, 378 [1945]; *Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1, 14 [1984]; see also *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 244 [1984].)[10]

In *General Motors*, this Court addressed the compensation due when the government took temporary occupancy of property. Carefully parsing the words of the Fifth Amendment, the Court concluded first that "property" included all interests in land an individual might hold, and then decided that determining what has been "taken" is based on "the deprivation of the former owner

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[9] See *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991) ("The Government does not have the right to declare itself a co-tenant-in-possession with a property owner.")

[10] This kind of delay is unrelated to the delay suffered in *Agins* while the city studied condemning the property. (See APA, p. 15.) Absent a direct legal restraint, potential condemnees are free to use their land as they see fit. (*Kirby*, 467 U.S. at 15.) Not so, the targets of a moratorium.

rather than the accretion of a right or interest to the sovereign. . . . " (323 U.S. at 378.) There, what was taken was an estate for years, i.e., a temporary deprivation of the right of use. The same is true at bench – but without the agency honestly fessing up to it. (See also *United States v. Petty Motor Co.*, 327 U.S. 372, 378 [1946] [constitutionally immaterial whether government took leasehold, or right to use "or only destroyed the tenant's right of occupancy"].)

In *Kirby*, which dealt with the government's delay in completing an acquisition, the Court concluded simply that:

> "We have frequently recognized that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property." (467 U.S. at 14; Marshall, J., for a unanimous Court.)

"[R]adical curtailment of a landowner's freedom to make use of . . . his land" seems a stunningly apt description of what TRPA did here. When government enacts regulations so severe that they prevent all economically productive private use of privately owned land, the government has taken an interest in the land as surely as if it directly condemned it. Fifth Amendment compensation follows. As this Court put it in *First English*, "government action that works a taking of property rights *necessarily* implicates the 'constitutional obligation to pay just compensation.' [Citation.]" (482 U.S. at 315; emphasis added.)

B Courts Have Always Protected the Right of User.

This Court has repeatedly framed its test for a regulatory taking in terms of the ability of landowners to *use* their land.[11]

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[11] *Penn Central*, 438 U.S. at 124; *Kaiser Aetna v. United States*, 444 U.S. 164, 174 n. 8 (1979); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *San Diego Gas*, 450 U.S. at 653 (1981) (Brennan, J.,

Lucas was most decisive in focusing on denial of use as the key to a regulatory taking.[12] There, the Court repeatedly stressed its concern with the impact of South Carolina's regulation on Mr. Lucas' ability to make rational use of his vacant, but subdivided, land.[13] In its most recent decision, *Palazzolo v. Rhode Island*, 533 U.S. ___, 150 L.Ed.2d 592, 607 (2001), the Court reiterated this *Lucas* conclusion, as it assumed the owner could have built a substantial home on his land.

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dissenting); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 296 (1981); *Kirby*, 467 U.S. at 14; *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987); *Lucas*, 505 U.S. at 1015; *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725, 736, fn. 10 (1997); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 700 (1999); *Palazzolo v. Rhode Island*, 533 U.S. ___, 150 L.Ed.2d 592, 607 (2001).

[12] To be sure, references to deprivation of value can also be found in the opinion. That is understandable in light of the fact that the state trial court had found that the regulation deprived Mr. Lucas of all his land's value (a finding that seemed to engender substantial skepticism [see 505 U.S. at 1033-1034 (Kennedy, J., concurring)]). But the Court's emphasis plainly was on the loss of use, which was determinative.

[13] *Lucas*, 505 U.S. at 1016 ["economically viable use"]; 1016, fn. 6 ["economically viable use"; "economically beneficial use"]; 1016, fn. 7 ["economically feasible use"; "economically beneficial use"]; 1017 ["beneficial use"; "productive or economically beneficial use"]; 1018 ["economically beneficial uses"; "economically beneficial or productive options for its use"]; 1019 ["developmental uses"; "economically beneficial uses"; "economically idle"]; 1019, fn. 8 ["economically beneficial use"; "productive use"]; 1027 ["economically beneficial use"]; 1028 ["economically valuable use"]; 1029 ["economically beneficial use"]; 1030 ["economically productive or beneficial uses"].

The relationship of use to value was part of the recent *Del Monte Dunes* litigation. There, after the city had repeatedly turned down development applications and the owner had sued for compensation, the state bought the property for less than the testimony of its fair market value, but more than the owner had paid for it earlier. The jury nonetheless returned a verdict in the owner's favor, the Court of Appeals affirmed (*Del Monte Dunes v. City of Monterey*, 95 F.3d 1422, 1433 [9th Cir. 1996]), and this Court affirmed as well (526 U.S. 687). Moreover, the Court of Appeals discussed the question of remaining value in terms of a moratorium, in words that presaged the facts here:

> "For example, in conjunction with a legislative moratorium on property development, a state might implement a 'buy-out' program for environmentally sensitive property and purchase a landowner's property at a higher price than what the landowner originally paid. [Citations to *Lucas* and an earlier TRPA case.] A government buy-out, of course would not necessarily shield the government from the Takings Clause. Rather, the buy-out would likely implicate the issue of just compensation. Thus, a landowner who believed that the government bought out his property at an unfairly low price might choose to bring an action for just compensation." (95 F.3d at 1432.)

The idea that use is a key right in the property rights bundle is not restricted to takings law. As this Court concluded in a tax case:

> "We have little difficulty accepting the theory that *the use of valuable property . . . is itself a legally protectible property interest*. Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order." (*Dickman v. Commissioner*, 465 U.S. 330, 336 [1984]; emphasis added.)

C Whether the Taking is Temporary or Permanent is Constitutionally Irrelevant; It Only Goes to the Quantum of Compensation Payable Under the Just Compensation Clause.

In *First English*, this Court plainly acknowledged the concept of a temporary taking and the constitutional necessity to compensate when one occurs. (482 U.S. at 318.) It appears that TRPA and its friends are upset that the context of *First English* was a temporary planning moratorium of about the same length as the pre-1984 moratoria here. To evade that nasty factual coincidence, two of TRPA's amici insist that the facts of *First English* are "entirely irrelevant" to its holding. (States, p. 25; APA, p. 18, fn. 6.) Can't be so. Holdings are always tied to their facts, and if the Court believed the facts – as a matter of law – *could not* support a taking, it would have refused to decide the issue, as it had previously. (See *First English*, 482 U.S. at 311.)

Moreover, in *Lucas*, the government argued that its regulation had been amended so that Mr. Lucas could apply for a permit, rendering any consideration of a taking premature. This Court would have none of it, concluding that the question of whether the amendment had rendered the taking temporary could be decided by the state courts on remand. (505 U.S. at 1011-1012 [citing *First English*].)[14] In his concurring opinion, Justice Kennedy also noted that this only presented a question for remand, saying "it is well established that temporary takings are as protected by the Constitution as are permanent ones. [Citing *First English*.]" (505 U.S. at 1033.)

TRPA also asserts that economically viable use cannot mean "immediate" use. (TRPA, pp. 16, 31.) Sometimes, it does. Although landowners may have to wait a modest amount of time while development applications

[14] On remand, the South Carolina Supreme Court found a temporary taking as a matter of law. (*Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 [S.C. 1992].)

are being processed (not frozen, but processed),[15] a deliberate government development ban is a far different creature. For example, in *Lomarch Corp. v. Mayor of Englewood*, 237 A.2d 881 (N.J. 1968), the court held that if government wanted to freeze the use of land for one year while deciding whether to acquire it, it had to compensate the owner for seizing his ability to use the land, equating the action with the purchase of an option on the private market. Similarly, in *Seawall Associates v. City of New York*, 544 N.Y.S.2d 542 (N.Y. 1989), the court held that a five year moratorium on converting low rent housing into anything else was a taking. The court found the ordinance facially invalid as a drastic interference with the owners' "*right to use* their properties as they see fit" (544 N.Y.S.2d at 549; emphasis, the Court's) and a taking of their right to develop their properties (544 N.Y.S.2d at 550).[16] In *Nolan v. Newtown Township*, 49 Pa. D. & C. 4th 148 (2000), a landowner sued when the township instituted an 18 month moratorium on subdivisions while it contemplated changes in its ordinance. The court held that he properly stated a claim under *First English* and set the matter for valuation. Those cases involved taking the "immediate" right to use.

Because of the shared constitutional parentage of direct and inverse condemnation law,[17] *First English* analogized the temporary moratorium before it to the condemnation of a

[15] Most states have enacted statutes concluding that 30 to 60 days is adequate time to process such applications. (See Steven J. Eagle, *Development Moratoria*, First English *Principles, and Regulatory Takings*, 31 Env. L. Rptr. 11232, 11236 [2001].)

[16] See also *Keystone Assocs. v. Moerdler*, 278 N.Y.S.2d 185 (N.Y. 1967) (invalidating an uncompensated 180-day delay on the right of the purchasers of the old Metropolitan Opera House to demolish and redevelop the property).

[17] See *Palazzolo*, 150 L.Ed.2d at, 618, fn. * (O'Connor, J., concurring), noting that regulatory takings involve two questions: (1) whether the regulation is valid under the police power, and (2) whether that police power exercise requires compensation.

leasehold for the same period of time. Even if the owner had no "immediate" plan for use, compensation would still be due.[18] Thus, the key to all takings is the deprivation of the owner's property rights. (See Eagle, op. cit., p. 11238.) The length of the deprivation affects only the quantum of compensation.

Similarly, TRPA's (and the Ninth Circuit's) position that temporary takings – by definition – cannot arise from regulations that were intended to be temporary, makes no sense.[19] If, as this Court has repeatedly held, the Constitution is concerned with the pragmatic impact of government action on citizens, then the mode of infliction is not determinative. If the action is severe enough to be a taking, then it remains a taking even if intended only for a finite period of time. Besides, the rule advocated by TRPA would open the door to abuses – for who is to say that an ostensibly temporary moratorium is not actually a substitute for a use prohibition? Or that a rolling series of "temporary" moratoria are not merely a surrogate for a permanent development ban? (See Eagle, op. cit., p. 11237-11238; Pet. App., pp. 163-164 [Kozinski, J., dissenting].)

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[18] It is bedrock condemnation law that the owner's personal plans are irrelevant. That the *valuation* in condemnation is related to the property's highest and best use (even if that is in the future) (see Govt. Associations, pp. 17-19) is irrelevant here, as it is a different issue. Regulatory takings are concerned with the impact of regulations today, as a threshold liability factor. Once past a liability finding, valuation would be as it always is in eminent domain. But the two issues should not be confused.

[19] The fact that a professor shares that view (see APA, p. 15) merely shows that even bright people can misread cases. For a contrary professorial view, see Bruce M. Kramer, *Recent Developments in Land Use and Environmental Law: Revolution or Evolution?* 1988 Institute on Planning, Zoning, and Eminent Domain, ch. 5, p. 5-5 ("intentionally or accidentally temporary in nature").

The Solicitor General parts company with TRPA and posits that there "could be circumstances in which even land-use regulation that was intended from the outset to be temporary should be analyzed under the *Lucas* per se takings approach. . . . " (SG, p. 28.) To find such circumstances, the brief insists that:

> "the regulation precluded all economically viable use of property during the period it was in effect *and* also shared the other characteristics of the regulation that was found in *Lucas* to be a per se taking – *i.e.*, if the regulation imposed markedly disproportionate burdens on isolated landowners rather than securing a reciprocity of advantage to a broad community, effectively pressed private property into public service (albeit for a finite period), and represented a significant departure from background property-law principles." (SG, p. 28.)

If that is to be the test, this case meets each part. First, although these moratoria adversely affected a substantial number of properties, they placed a disproportionate burden on relatively few because the area under TRPA's regulation covers some *500 square miles, with thousands upon thousands of subdivided lots*. The affected property owners are only those in the so-called "high hazard" areas on the steeper hillsides or in the stream environment zones. All the vacant lots in that targeted area – and only those – were frozen by the moratoria. Second, those targeted individuals received *no* "reciprocity of advantage" – indeed, no advantage of any kind – from either the moratoria or the permanent regulations that followed. Their lots were frozen in 1981 and remain so. That *others* in the Tahoe Basin benefit from the Petitioners' sacrifice only underscores the disproportionality of the Petitioners' loss. Third, all of these properties were pressed into public service, i.e., complete non-use, because that is the "service" TRPA demanded.[20] Fourth, the proof of

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[20] Please recall that the trial court found the regulations were written in such draconian terms that some of these landowners could not even set foot *on their own land* (because

the impact of these moratoria is in the permanent regulations that replaced them. In light of TRPA's mission to stop the eutrophication of the lake, along with the known science that made it a foregone conclusion that stopping development on these lands in perpetuity was the only solution (see, e.g., the amicus brief filed here by a group of scientists), the moratorium *did* reflect a final determination about the non-use of these lots. It merely held them in limbo until formal studies could be completed justifying a permanent development ban. And the permanent regulations that followed (which, as the trial court found, made no change in what the Petitioners could do [Pet. App., pp. 75-76]) proved that. Finally, no "background" legal precept holds that the property of a selected group of individuals (even a fairly large group) can be singled out for a *de facto* taking to benefit a larger group.

These landowners were subjected to unconstitutional regulation, and their lands were *per se* taken, even under the Solicitor General's proposed criteria.

III TRPA'S VIRTUOUS PURPOSE CANNOT JUSTIFY CONFISCATING THE USE OF PRIVATE PROPERTY WITHOUT COMPENSATION.

TRPA and most of its amici spend an inordinate amount of time crashing through a door that was never locked, when they argue that Lake Tahoe is beautiful and worth preserving, and therefore it is necessary to restrict development in the Tahoe Basin.[21] Indeed, the amicus

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that would disturb the site) *unless they obtained a permit from TRPA*. (Pet. App., p. 73.)

[21] Stressing environmental factors has become a favored tactic of pro-regulation advocates these days. See, e.g., Richard J. Lazarus, *Litigating Suitum v. Tahoe Reg'l Planning Agency in the United States Supreme Court*, 12 J. Land Use & Env'tl Law 179 (1997), in which counsel for TRPA in *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725 (1997) (and one of its counsel in this case, as well) describes the way he tried to spin the analysis away from

brief by a group of scientists is wholly devoted to that point. Petitioners do not dispute it. (See, e.g., Cert. Pet., pp. 6-7; Pet. Br., p. 3.) It's all irrelevant.

This case is about *means* not *ends*. What is at issue is *not* whether TRPA can protect the glory of Lake Tahoe, but whether it can do so by freezing the use of Petitioners' land without compensation.[22] As the Supreme Judicial Court of Massachusetts aptly observed:

> "In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the Department of Conservation to look after the interests of the former, and it is the duty of the courts to stand guard over constitutional rights." (*Commissioner of Natural Resources v. S. Volpe & Co., Inc.*, 206 N.E.2d 666, 671 [Mass. 1964].)[23]

TRPA and its amici believe (as did the Ninth Circuit) that TRPA's goals were praiseworthy. TRPA can surely take credit for halting development in those areas of the Tahoe Basin it deemed hazardous to the Lake's purity. The constitutional problem is that it did so at the expense

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the constitutional issues at its heart and toward paeans to the beauty of Lake Tahoe.

[22] Thus, comments like the following, from the Council of State Governments and seven similar organizations, are singularly off target: "Without the protections challenged in this case, the Lake would turn green . . . and land values in the region would plummet." (Govt. Associations, p. 16, fn. 11.) No "protections" are "challenged" in this case. The landowners seek compensation, not invalidation of "protections."

[23] Some eight decades ago, in *Pennsylvania Coal*, the dissenting opinion argued the contrary position that a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking." (260 U.S. at 417.) Eight Justices rejected that proposition. The Court has consistently rejected that proposition ever since. (See cases discussed at Pet. Br., pp. 39-44.)

of a targeted group of individuals who weren't doing anything improper with their land. In fact, all they ever wanted to do with it was to use it in the very way for which the land had been officially planned and zoned for many years (as many of their neighbors had done): personal, single-family homes on lots that had already been lawfully subdivided for that purpose.[24] The protection of what TRPA calls "the crown jewel of the Sierra Nevada mountain range" (TRPA, p. 4) is not the responsibility of individuals. The Crown protects the crown jewels.[25] In the words of the Texas Supreme Court, there is no rule holding " . . . that government may take or hold another's property without paying for it, just because the land is pretty." (*City of Austin v. Teague*, 570 S.W.2d 389, 394 [Tex. 1978].)

Thus, when the federal government decided to protect the ancient Coast Redwoods, another irreplaceable environmental treasure, it bought them. (Pub. L. 90-454, 82 Stat. 931 [1968].) And so it should here.

IV THE SKY WILL NOT FALL IF LANDOWNERS ARE COMPENSATED.

The briefs filed in support of the Ninth Circuit's ruling raise familiar "Chicken Little" arguments, of the

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[24] It cannot go without at least a brief mention that constructing housing is deemed a highly favored activity that is encouraged by a host of government policies, subsidies, and tax advantages. There is thus simply nothing wrong with Petitioners' desire to build individual homes on their land explicitly zoned for that purpose. (The fact that their neighbors were not ordered to demolish their homes shows there was nothing inherently wrong with Petitioners' plans. [See *Lucas*, 505 U.S. at 1031.])

[25] The law obliges the government to purchase the property it requires to further the public interest and not compel its owners to have to sue for compensation. (42 U.S.C. § 4651[8].) California and Nevada adopted similar laws patterned after the federal statute. (Cal. Govt. Code § 7267.6; NRS 342.045.)

"parade of horribles" variety. (E.g., Audubon, p. 2; Govt. Associations, p. 3; States, p. 1.) Their alarums are unfounded.[26] The real problem is that, relying on undue judicial deference to their handiwork, many land use regulators have grown lax and lazy about keeping their plans up to date, and have lapsed into the unfortunate practice of using *ad hoc* moratoria as substitutes for municipal foresight and responsible planning. As two lawyer/land use consultants put it in an American Planning Association publication, "moratoria should not be used as a crutch in place of long-term planning. . . . " (Wendy U. Larsen & Marcella Larsen, *Moratoria as Takings Under* Lucas, 46 Land Use Law & Zoning Digest, no. 6, p. 3 [1994].) Building on that thought, a more recent text concluded:

> "moratoria are not an acceptable substitute for consistent advance long-term planning. Moratoria are enacted, in most cases, because comprehensive plans and land development regulations have not been prepared or kept current with changing conditions. If they were, development applications which are unwanted and the kind of 'emergency' planning studies which engender moratoria would be avoided." (Michael A. Zizka, et al., State & Local Government Land Use Liability § 4:4, p. 4-14 [rev. 2000].)

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[26] The tactic is becoming hackneyed. The Court's own files in *First English*, for example, enshrine a variety of such arguments. There, a large group of state amici said the church was seeking a "radical reformulation of takings jurisprudence" that would "cripple" regulators (pp.1-2), risk "financial chaos," and have "a major chilling effect on the regulatory process" (p. 23). The State and Local Legal Center predicted that a ruling adverse to the government would "paralyze" public health and safety regulation, "threatening bankruptcy" for municipalities. (p.3.) However, when this Court ruled against the government, life continued, and there have been no reports of municipal paralysis or bankruptcy related to the opinion.

As for the financial catastrophe that TRPA and its amici predict, the Larsens' article concludes that if categorical moratoria (like the ones at bench) are invoked properly (i.e., rarely and for limited times and reasons), "the instances where the *Lucas* categorical taking rule would come into play with moratoria should be relatively rare. [¶] Moratoria will even more rarely cause takings when communities are careful *not* to use them as substitutes for consistent long-term planning." (Larsen & Larsen, *op. cit.*, 46 Land Use Law & Zoning Digest, no. 6, p. 7; emphasis in original.)[27]

CONCLUSION

TRPA sacrificed the rights of these landowners so that Lake Tahoe could remain clear and blue and beautiful. It is time for TRPA to shoulder the burden for that very public project by compensating them for what was taken.

Petitioners pray that the decision of the Ninth Circuit be reversed.

Respectfully submitted,

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[27] Unfortunately, the Solicitor General's brief does not add clarity on this point, possibly because the United States does not engage in land use regulation like state and local government agencies do and that office is less familiar with the process. That resulted in a brief that mistakenly seeks to minimize the use and impact of moratoria. Thus, while the Solicitor General believes that "no land-use agency is likely to employ moratoria on a routine basis" (SG, p. 19), that is simply not so. Others properly note that moratoria are used so often they have become a standard, albeit improper, tool in the governmental box (e.g., States, p. 2; Govt. Associations, pp. 1, 4, 7).